



DEPARTMENT OF THE ARMY
HEADQUARTERS, UNITED STATES ARMY FORCES COMMAND
FORT MCPHERSON, GEORGIA 30330-6000

REPLY TO
ATTENTION OF

AFLG-PROM

18 February 1997

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contracting Information Letter (CIL) 97-19

1. This CIL contains information on the following:
 - a. Temporary Suspension of Past Performance Implementation Thresholds,
 - b. Wage Determination On-Line Program,
 - c. Streamlined Accounting for Micro Purchases Under the Government Purchase Card Program (IMPAC),
 - d. List of Recurring Reports,
 - e. Business, Cost Estimating and Financial Management (BCEFM) Workshop,
 - f. Changes to Redbook,
 - g. Outsourcing Guide for Contracting,
 - h. Appeal of MDP Construction, Inc., and
 - i. Lessons Learned from GAO Decision B-274765.1, Collins Companies.

2. Temporary Suspension of Past Performance Implementation Thresholds.

On 18 December 1996, the Office of Federal Procurement Policy temporarily suspended the use of past performance information (PPI) in source selection on contracts below \$1 million, and preparation of contractor performance evaluations (CPE) on contracts less than \$1 million. DOD followed up on 20 December 1996 by authorizing deviations from FAR 15.605(b)(1)(ii) and FAR 42.1502(a), until the FAR is amended (see SARD-PI memorandum dated 30 January 1997, with enclosures, at enclosure 1).

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a. The primary actions affected by the OFPP suspension/DOD deviation are "best value" solicitations which include use of past performance as a weighted evaluation factor in the best value trade-off decision. Our interpretation of the OFPP suspension is that the use of PPI as a separate evaluation factor is *neither mandated nor prohibited* for actions less than **\$1 million**. The decision to use PPI as a separate, weighted factor for actions less than \$1 million is left to the discretion of the contracting officer. In such cases, we recommend the contracting officer document the contract file as to why PPI was included as a weighted factor, based on the facts and concerns surrounding the particular acquisition. The use of PPI as part of a determination of contractor responsibility in accordance with FAR 9.104-1 is not affected by the suspension change. Offerors may still be required to submit information bearing on their past performance as part of their proposal.

b. The suspension has little impact on the preparation of contractor performance evaluations (CPE). Current FORSCOM guidance - that the scope and level of detail of the CPE should be commensurate with the dollar value, complexity and/or criticality of the contract requirement - still applies. Contract administration responsibilities for maintaining and reporting contractor performance information (FAR 46.104); the recognition that information on contractor past performance is useful and desirable regardless of contract amount; and FORSCOM's promotion of a systematic and consistent method of documenting and reporting contractor performance - all indicate the need to continue preparing CPEs on all contracts. The only difference is that CPEs for contracts under \$1 million will not have to be submitted to the Army Contracting Support Agency as required by AFARS 42.1503(d)(i). Contact Joan Sylvester at DSN 367-6237 for additional information.

3. Wage Determination On-Line Program.

a. The Department of Labor published two final rules 30 Dec 96 in Volume 61, Number 251 of the Federal Register. The first rule continues suspension of regulations governing the employment of "semi-skilled helpers" on construction contracts subject to the prevailing wage standards of the Davis-Bacon and related acts. The second rule changes the methodology for establishing minimum health and benefits requirements under the Service

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Contract Act. The latter change will be effective 1 June 1997 and involves which benefit rate to choose. In summary, there will be one uniform benefit rate based upon nationwide ECI data (\$1.91 for 1996) rather than two separate rates for high and low fringe benefits, or "total benefits" and "insurance" (currently \$2.56 and \$.90 respectively). However, there is a grandfathering provision for current contracts and future solicitations which use the high fringe rate. The grandfathering provision will not apply to contracts for new services.

b. The Army Labor Advisor will conduct VTCs in March. The FORSCOM VTC is scheduled for 4 March 1997, 1300 to 1500 hours. The training document is currently available on the DOL wage determination server. We can also email training materials (enclosures to CIL 97-13) upon request to installations without Internet access. Contact Pat Boterweg at DSN 367-5486 for additional information.

4. Streamlined Accounting for Micro Purchases Under the Government Purchase Card Program (IMPAC).

a. Reference ASA(FM&C) memorandum, 24 January 97, SAB (enclosure 2). Installations that have implemented the bulk funding of credit cards with a single line of accounting policy will receive a reduced DFAS rate of \$20.00 (currently \$24.96) once Army transitions to the new software system, Corporate Payment Systems (CPS). Please note that the Agency Program Coordinator training is now planned April through May 97.

b. Of particular interest is the last sentence on page one of referenced memorandum: "Cards without accounting information loaded in the Master Accounting Code field on the Rocky Mountain Bank Card will not be converted to CPS and will be canceled." Installations that have not yet implemented this policy, and do not have an approved exception, must do so before Rocky Mountain Bank converts to the CPS data platform. The DPW community may operate under their exception until their system has been modified to accommodate a single line of accounting per account. System changes are projected to be fielded in the fourth quarter of FY 97. Pat Boterweg, DSN 367-5486 can provide additional information.

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5. List of Recurring Reports. At enclosure 3 is the latest list of recurring reports, effective 1 February 1997. Contact Alan Schantz, DSN 367-6227 for additional information.

6. Business, Cost estimating and Financial Management BCEFM) Workshop.

a. Subject workshop is a mandatory course for Level III certification in BCEFM. It is conducted at the Defense Systems Management College, Fort Belvoir, VA.

b. Course Description: The BCEFM Workshop will teach students how to apply BCEFM concepts, techniques, or on-the-job experience as they relate to functional interrelationships and opportunities among the disciplines of cost estimating, contract performance management, and financial management or program control.

c. Course Prerequisites: Prerequisites for the workshop include completion of either Intermediate Systems Acquisition Management (ACQ 201) or a combination of Fundamentals of Cost Analysis (BCE 101), Systems Acquisition Funds Management (BFM 201), and Contract Performance Management Fundamentals (BFM 102).

7. Changes to Redbook. Please add the pages (84 thru 84d) at enclosure 4 to the Redbook, "*Forces Command Contracting Management Reviews.*"

8. Outsourcing Guide for Contracting. The Air Force has published an *Outsourcing Guide for Contracting*. This guide is an excellent synopsis of current laws, policy, and appropriate procedures. The guide is accessible on the world-wide web at: <http://www.safaq.hq.af.mil/contracting/policy/ACQO/part07/part7pg9.html>. For additional information, please contact Libby Morris at DSN 367-6276.

9. Appeal of MDP Construction, Inc.

a. Reference Appeals of MDP Construction, Inc., dated 4 September 1996 and 24 October 1996, SAB (encl 5).

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b. The referenced document provides Armed Services Board of Contract Appeal's (ASBCA) decision. The customer, Department of Public Work Family Housing had two separate contracts issued for work in family housing area at Fort Carson, Colorado. A requirements contract was awarded by the Directorate of Contracting, Fort Carson and a renovation contract was awarded by the Army Corps of Engineers (COE). The Government was held liable for all duplicated work and the appeal was sustained.

c. There are two important points to be learned from this decision of the ASBCA. First, in looking at FAR clause 52.216-21 REQUIREMENTS (APR 1984), the Board determined that the term "Government activity" means the military activity where the work takes place and not the contracting activity that is handling the contract. The Board said if it followed the Army's interpretation it would permit the Government to breach a requirements contract with impunity simply by arranging for an associated activity - the COE, the Navy, the Air Force, etc., to place the breaching contract.

d. The second point is that the Board did not permit the Army to avoid liability by arguing that the second contract contains more comprehensive work than the first contract. The Board found "the fact that contract 128 duplicated only some of contract 29's work and required only removal or installation rather than both removal and installation of fixtures, does not defeat liability for the duplicated work."

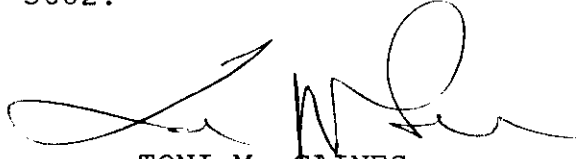
e. Please provide copy of this CIL to your customers. Communication is a must to avoid duplication of services and loss of vital resources. For additional information, please contact Ms. Susan Marie Clark at DSN 367-5602.

10. Lessons Learned from GAO Decision B-274765.1, Collins Companies. At enclosure 6 is lessons learned from subject decision. The Army rejected Collin's bid as nonresponsive because it contained only facsimile bid bond documents. The telefaxed bid bond document did not establish that the survey would be bound to honor the bond in the event of default. The

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protest was denied. For additional information, please contact Susan Clark at DSN 367-5602.



TONI M. GAINES
Chief, Contracting Division, DCSLR
Principal Assistant Responsible
for Contracting

6 Encls
as

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DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
RESEARCH DEVELOPMENT AND ACQUISITION
103 ARMY PENTAGON
WASHINGTON DC 20310-0103

FEB 04 1997

REPLY TO
ATTENTION OF

30 JAN 1997

SARD-PI

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Temporary Suspension of Past Performance Implementation
Thresholds

On December 18, 1996 the Administrator of the Office of Federal Procurement Policy (OFPP) temporarily suspended mandatory implementation of the requirements in Federal Acquisition Regulation (FAR) 15.605(b)(1)(ii) to use past performance information in source selection on contracts below \$1 million and in 42.1502(a) to prepare contractor performance evaluations on contracts less than \$1 million (enclosure 1). The period of the suspension is indefinite. On December 20, 1996, the Director, Defense Procurement, authorized deviations from FAR 15.605(b)(1)(ii) and FAR 42.1502(a) to correspond with the suspension of OFPP Letter 92-5, Past Performance Information as described above (enclosure 2). The deviation remains in effect until the FAR is amended.

Since the FAR past performance requirements were published there has been considerable discussion among the agencies on the amount and type of information that should be collected, and on the cost effectiveness of collecting and using past performance data on smaller contracts. I will use the time afforded by this suspension to examine these issues. As a member of the DOD Past Performance Coordinating Council, I will work with the other Defense components' senior procurement executives to develop a DOD position on use and collection of performance information.

I know some of you are developing systems for collecting and using past performance information. I endorse the Deputy Undersecretary of Defense for Acquisition Reform's request that you delay any new efforts to design and implement collection systems until we have completed our review of the thresholds and the types of data to collect (enclosure 3). You may continue to use existing systems.

Encl 1



I ask you to continue to emphasize the importance of evaluating contractor past performance using all available techniques and information as we go through this review. I remain fully committed to past performance as an important tool for enhancing the acquisition process.



Kenneth J. Oscar
Deputy Assistant Secretary of the Army
(Procurement)

Enclosures

DISTRIBUTION:

Program Executive Officer: Armored Systems Modernization, ATTN:
SFAE-ASM, Warren, MI 48397-5000
Program Executive Officer: Aviation, ATTN: SFAE-AV, 4300
Goodfellow Boulevard, St. Louis, MO 63120-1798
Program Executive Officer: Command, Control and Communication
Systems, ATTN: SFAE-C3S-PMO, Fort Monmouth, NJ 07703-5401
Program Executive Officer: Field Artillery Systems, ATTN: SFAE-FAS,
Picatinny Arsenal, NJ 07806-5000
Program Executive Officer: Standard Army Management Information
Systems, ATTN: SFAE-PS, 9350 Hall Road, Suite 142, Fort Belvoir, VA
22060-5895
Program Executive Officer: Tactical Missiles, ATTN: SFAE-MSL,
Redstone Arsenal, AL 35898-8000
Program Executive Officer: Tactical Wheeled Vehicles, ATTN: SFAE-
TWV, Warren, MI 48397-5000
Program Executive Officer: Missile Defense, ATTN: SFAE-MD-DP-R,
P.O. Box 1500, (D. Tritt), Huntsville, AL 35807-3801
Program Executive Officer: Intelligence and Electronic Warfare, ATTN:
SFAE-IEW, Fort Monmouth, NJ 07703-5000
Program Executive Officer: Cruise Missiles Project and Highway,
Arlington, VA 22246
Program Executive Officer: Combat Support Systems, ATTN: AF-PEO-
CB, 1090 Air Force Pentagon, Washington, DC 20330-1090



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

December 18, 1996

OFFICE OF FEDERAL
PROCUREMENT POLICY

MEMORANDUM FOR AGENCY SENIOR PROCUREMENT EXECUTIVES
AND THE DEPUTY UNDER SECRETARY
OF DEFENSE (ACQUISITION REFORM)

FROM:

Steven Kelman
Administrator

SK

SUBJECT:

Temporary Suspension of Past Performance
Implementation Thresholds

The Federal Acquisition Regulation (FAR) at sections 15.605 and 42.1502 requires the use of past performance information in source selection and the evaluation of current performance on a periodic basis at specified thresholds over the next two years. Currently, FAR requires the use of past performance as a source selection factor in all procurements of \$1 million or more and the preparation of past performance evaluations for contracts at or above \$500,000. Feedback from agencies indicates that our concerted efforts to increase the use of past performance is motivating contractors to improve their performance and is enabling source selection officials to make better determinations of what constitutes "best value". However, there has been discussion among the agencies on the amount and type of information that should be collected, and on the cost effectiveness of collecting and using past performance data on smaller dollar contracts.

As a result of these discussions, I am temporarily suspending mandatory implementation of the requirement to use past performance information in source selections on contracts below \$1 million and the requirement to provide past performance evaluations on contracts of less than \$1 million while we work together to revisit the threshold timing and amount, and the type of data to collect in various business areas.

Training and other management efforts to ensure that past performance is effectively and economically used to help achieve best value source selections remains a top priority. I hope this matter remains a priority for your management attention and urge you to actively participate in this important discussion.



OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000



ACQUISITION AND
TECHNOLOGY

December 20, 1996

DP (DAR)

In reply refer to
DAR Tracking No: 96-00010

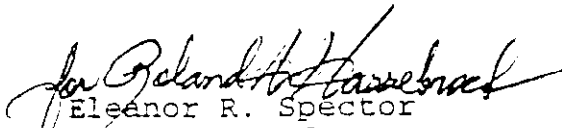
MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES
DEPUTY FOR ACQUISITION AND BUSINESS MANAGEMENT,
ASN(RD&A)/ABM
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING), SAF/AQC
DIRECTOR, PROCUREMENT POLICY, ASA(RD&A)/SARD-PP
DEPUTY DIRECTOR (ACQUISITION), DEFENSE LOGISTICS AGENCY

SUBJECT: Past Performance

Effective immediately, I authorize all military departments and defense agencies to deviate from the requirements of Federal Acquisition Regulation (FAR) 15.605(b)(1)(ii) for evaluation of past performance in competitively negotiated acquisitions with an estimated value of less than \$1 million, and of FAR 42.1502(a) for preparation of an evaluation of contractor performance for contracts of less than \$1 million.

FAR 15.605(b)(1)(ii) and 42.1502(a) implement Office of Federal Procurement Policy Letter 92-5, Past Performance Information. The Administrator, Office of Federal Procurement Policy, has temporarily suspended mandatory implementation of the requirement to use past performance information in source selections on contracts below \$1 million and the requirement to provide past performance evaluations on contracts of less than \$1 million. I am, therefore, authorizing this deviation from the requirements in FAR 15.605 for solicitations of less than \$1 million, and in 42.1502 for contracts of less than \$1 million.

This class deviation will remain in effect until the FAR is revised.


Eleanor R. Spector
Director, Defense Procurement

cc: DSMC, Ft. Belvoir





OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON DC 20301-3000

18 DEC 1996

MEMORANDUM FOR SENIOR PROCUREMENT EXECUTIVES
DIRECTOR, LOGISTICS AGENCY
COMMANDER, DEFENSE CONTRACT MANAGEMENT COMMAND

SUBJECT: Collection and Use of Past Performance Information in the Source Selection Process

The Department of Defense is committed to utilizing past performance information (PPI), to ensure that we have access to a globally competitive national industrial base capable of supplying the best value goods and services that meet the requirements of our warfighters. We firmly believe that the use of PPI is an important strategic tool which, when properly employed, allows us to evaluate the risk of poor or non-performance as well as the potential for excellent versus satisfactory performance, and to make certain trade-offs, depending on the nature of our requirement, in the source selection process.

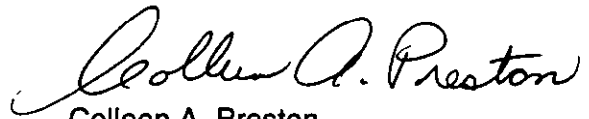
The Department is looking at what, if any, DoD policy we should issue in terms of the use and collection of PPI. A study was performed by Arthur D. Little (ADL) looking at both the way in which we, and industry, employ PPI. ADL was also charged with recommending a "to be" process for the collection and use of PPI. The results of the study (principally it recommended that use of the data should drive collection and that most PPI systems should be oriented by business area as opposed to dollar threshold), and its recommendation, are now being reviewed by my office in conjunction with the Past Performance Coordinating Council (PPCC) to determine how we should go about implementing those recommendations. The PPCC is made up of representatives from the senior procurement executives of the Army, Navy, Air Force and the Defense Logistics Agency. We have invited the Office Federal Procurement Policy (OFPP) to join the PPCC in this process.

OFPP issued a letter this date temporarily suspending the requirement to collect PPI on contracts between \$500,000 and \$1 million to allow us to complete our review of ADL's report and to reach a decision on which direction the Department should take. We anticipate completing our review in the next two to three months. In addition, the working group will consider any necessary changes to the draft proposed Defense Federal Acquisition Regulation Supplement coverage, if a new approach is adopted. Final guidance will be provided as soon as possible.

We know that many of you are in the process of trying to implement the requirement for the collection and use of PPI. We ask that you not start any new efforts to design and implement PPI collection systems until the PPCC has completed its review and provides its recommendations. If you already have PPI systems under development, you may continue development, but please keep in mind that PPCC's recommendations may result in significantly



changed requirements. This does not mean that you are to stop using PPI in source selections, to the extent you have an adequate information collection system. It does mean that you should not begin collecting PPI information on contracts between \$500,000 and \$1 million.

A handwritten signature in black ink, reading "Colleen A. Preston". The signature is fluid and cursive, with the first name "Colleen" and last name "Preston" clearly legible.

Colleen A. Preston
Deputy Under Secretary of Defense
(Acquisition Reform)

cc:
Director, DP
Director, TSE&E



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
FINANCIAL MANAGEMENT
109 ARMY PENTAGON
WASHINGTON DC 20310-0109

24 JAN 1997



MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Streamlined Accounting for Micro Purchases Under the
Government Purchase Card Program (IMPAC)

On September 16, 1996, the DASA(FO) released a policy memorandum (enclosed) instructing all Army activities to fund IMPAC purchases in "bulk" and to assign a single line of accounting to each card holder account. The purpose of this memorandum is to reiterate my support for this mandatory change in business practice.

Bulk funding and single lines of accounting are both key practices that we must adopt to reduce the cost of finance and accounting associated with the purchase card program. Currently, DFAS charges the Army \$24.92 per purchase transaction using the IMPAC card because many activities assign a different line of accounting to each and every purchase. To reward our initiative to adopt bulk funding and single line of accounting, DFAS is offering a reduced rate of \$20.00 to activities that meet the following conditions:

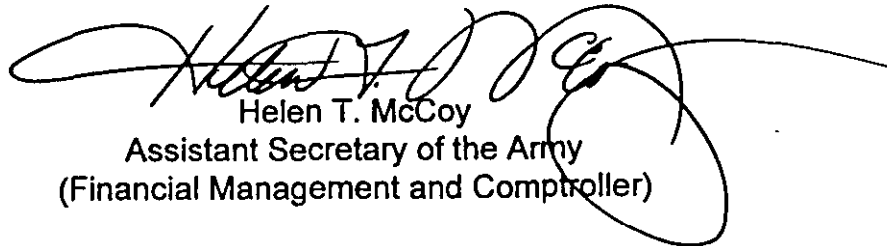
1. Use bulk funding.
2. Assign one line of accounting to each account.
3. Use one of four automated purchase card management systems.
4. Certify IMPAC invoices for payment using new DoD guidance.

By June 1997, all Army activities will qualify for this discount because we transition to a new software system, the Corporate Payment System (CPS), and will use this transition to enforce the requirement for a single line of accounting for each purchase card account. During April and May 1997, we will be providing standardized training that will teach you about the new system, allow you to establish Certifying Officers, and provide you with the MDW Purchase Card Management System.

In preparation for these changes, Major Command Resource Managers must take a personal interest in ensuring a single line of accounting is assigned to each of card holder account financed by your activity. Cards without accounting information loaded in the Master Accounting Code field on the Rocky Mountain Bank Card will not be converted to CPS and will be canceled.

Encl 2

My point of contact for this action is Ms. Kathleen S. Miller. She can be reached at DSN 227-0757, commercial (703) 697-0757 or her email address is millerk@pentagon-asafm.army.mil or milleks@hqda.army.mil. Her fax number is (703) 695-2028.



Helen T. McCoy
Assistant Secretary of the Army
(Financial Management and Comptroller)

Enclosure

DISTRIBUTION:

Office, Secretary of the Army, ATTN: SAAA-RM, Washington, DC 20310-0105

Commander-in-Chief, U.S. Army Europe and Seventh Army, ATTN:
AEAGF-RM, APO AE 09014

Commander:

U.S. Forces Command, ATTN: FCRM-FB, Fort McPherson, GA
30330-6000

Eighth U.S. Army, ATTN: GCRM, Unit #15236 APO AP 96205-0009

U.S. Army Materiel Command, ATTN: AMCRM, 5001 Eisenhower Ave,
Alexandria, VA 22333-0001

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VA 23651-5000

U.S. Army Pacific, ATTN: APRM, Fort Shafter, HI 96858-5100

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78234-6000

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VA 22060-5370

U.S. Military Entrance Processing Command, ATTN: MEPCRM, 2500
Greenbay Road, North Chicago, IL 60064-3094



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
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109 ARMY PENTAGON
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16 SEP 1996

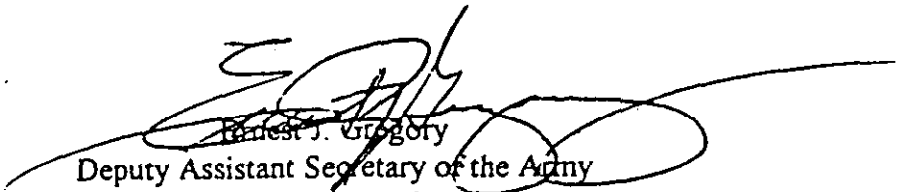
MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Funding and Obligation Instructions for Micropurchases Using the
International Merchant Purchase Authorization Card (IMPAC)

Army's working group reviewing the use of the IMPAC purchase card has completed its review and developed ten recommended changes to purchase card business practices. The working group developed streamlined business practices which will standardize the use of the card throughout the Army, simplify the use of the card, and most importantly, reduce the confusion and costs associated with accounting for purchase card transactions.

Attached is a synopsis of the revised business practices. Also, included in the attachment is specific financial management guidance for assigning one accounting classification to each IMPAC account and establishing bulk reservations of funds for card purchases. This financial management guidance is effective by October 1, 1996 and will be incorporated into future versions of DFAS 37-1. Any requests for exception to the financial management guidance must be approved by me.

My point of contact for this action is Ms. Kathleen S. Miller. She can be reached at DSN 227-0757, commercial (703)697-0757 or her email address is millerk@pentagon-asafm.army.mil. Her fax number is (703) 695-2028.


Robert J. Gregory
Deputy Assistant Secretary of the Army
(Financial Operations)

Attachment

FUNDING AND OBLIGATION INSTRUCTIONS FOR MICROPURCHASES USING THE INTERNATIONAL MERCHANT PURCHASE AUTHORIZATION CARD (IMPAC)

1. The purpose of this attachment is to provide guidance to the Army Financial Management Community on two of ten streamlined International Merchant Purchase Authorization Card (IMPAC) business practice recommendations. These changes are intended to streamline IMPAC use and reduce the administrative cost of managing the IMPAC program for purchases \$2500.00 and less (micropurchases). The ten changes are as follows:

- A. Develop and use Army standard audit guide and key management controls for the IMPAC program.
- B. Establish "blanket approvals" at the local level for commonly purchased items.
- C. Assign one accounting classification to each micropurchase IMPAC account.
- D. Reserve funding for card purchases in "bulk", not on a transaction by transaction basis.
- E. Eliminate formal purchase documentation for common buys made with IMPAC.
- F. Eliminate stock record accounting for non-standard, non-stocked, local purchase items of supply.
- G. Eliminate retail stock fund accounting for non-weapons related items purchased with IMPAC.
- H. Streamline property accountability requirements.
- I. Replace paper with automated files.
- J. Certify the invoice for payment at the local level.

2. This attachment provides specific guidance on recommendations (C) and (D) in the paragraph above which eliminate the requirement for posting detailed level accounting transactions (e.g., funding and obligations) for micropurchases. Listed below are five major changes to the current IMPAC processing procedures:

- a. All requests for a Cardholder account must be coordinated through the activity Resource Manager (RM).
- b. The RM will approve the spending limits applied to each Cardholder and Approving Official account.
- c. The RM will use the Cardholder's 30 day spending limit as the basis for creating and posting "bulk" funding reservations for each Cardholder account.

d. The RM will assign each Cardholder account a single accounting classification.

e. Fund reservations and fund certification will not be performed for each purchase transaction.

3. Upon receipt of this guidance, but not later than October 1, 1996, Resource Managers will coordinate with the Agency Program Coordinator (APC) to make the following changes to all new and existing IMPAC Cardholder micropurchase accounts. Cardholder updates should be completed prior to the first FY 97 IMPAC billing cycle. Procedural changes are as follows:

a. The RM will assign a single accounting classification for each IMPAC Cardholder account number. Use only one basic symbol on each card to provide an adequate audit trail for future interest payments, discounts and rebates. The accounting classification should be entered in the "Master Accounting Code" field on the IMPAC Cardholder account set-up or account maintenance information form. This will allow the accounting classification to be automatically reflected on the Cardholder's statement of account. A total of 50 characters is available in the Master Accounting field to accommodate the fund citation. The fund citation should be entered in this field as follows:

<u>POSITION</u>	<u>LENGTH</u>	<u>DATA ELEMENT</u>
1-2	2	Department
3	1	Fiscal Year (Fill With An Asterisk)
4-7	4	Basic Symbol
8-11	4	Limit/Subhead
12-13	2	Operating Agency (OA)
14-17	4	Allotment Serial Number (ASN)
18-21	4	Element of Resource (EOR)
22-35	14	Standard Document Number (SDN)
26-39	6	Account Processing Code (APC) or Cost Center
40-44	3	Blank or Local Use
45-50	6	Fiscal Station Number (FSN)

(1) Fill the Fiscal Year position with an asterisk. Cardholders will have to indicate the correct fiscal year on the statement of account. Right justify and zero fill any incomplete fields.

(2) Determine the most appropriate EOR for each IMPAC Cardholder account. Do not request additional cards to separate purchases by object class, instead pick the most appropriate EOR for that Cardholder. If your activity is already using an automated system to assign more specific EORs or accounting classifications to the transactions and this system forwards the detailed accounting transactions to

DFAS via electronic means (i.e. No manual keypunching by DFAS personnel), you may continue to use your local procedures.

(3) Assign a Standard Document Number SDN to each Cardholder's account. One of the two following methods should be used.

(a) Assign a single SDN to the Cardholder's account using the "Master Accounting Code" field as described in paragraph 3.a. above. This method will result in the same SDN being used for all purchases made under that Cardholder's account. Recommended structure is:

<u>POSITION</u>	<u>ENTRY</u>
1-5	"IMPAC"
6-9	Level 5 number (Approving Official)
10-14	First 5 of Cardholder's last name

(b) Assign a single SDN to each Cardholder's account for every monthly invoice. This allows managers to track obligations and disbursements by invoice. Managers choosing this option must ensure positions 1-5 and 10-14 are coded to the "Master Account Code" field. Positions 6-9 will be filled with an asterisk. Cardholders and/or Approving Officials will be responsible for ensuring the entire SDN, including Julian date, is clearly annotated on the Approving Official's copy of the RO90 sent to the finance office for payment.

<u>POSITION</u>	<u>ENTRY</u>
1-5	"IMPAC"
6-9	Julian date of invoice
10-14	First 5 of Cardholder's last name

(c) In order to safeguard IMPAC account numbers, we do not recommend using the last four positions of the Cardholder's account number in the SDN. MACOMs and activities currently using account numbers as part of the SDN structure are strongly encouraged to change this practice as soon as possible.

b. Resource Managers will fund IMPAC purchases using the "bulk" method. This method requires a periodic (monthly, bimonthly, quarterly) fund reservation (obligation or formal commitment) equal to the anticipated purchases for that period. Commitments will be posted prior to the beginning of the IMPAC billing cycle. Obligations will be posted not later than the invoice payment date. Disbursements should decrement bulk funding. Do not post individual line item obligations or disbursements for each purchase transaction.

4. Organizations using manual methods to forward payment information to DFAS should also make the following changes:

a. Cardholder Statements of Account (SOA) and other original documentation should be retained by the Approving Official or program manager for a period of three years.

b. Approving Officials should match the SOA to the Approving Official and Cardholder Account Summary (RO90), review disputed item forms, annotate the accounting classification for each card holder on the RO90, sign the RO90, and forward it and any dispute forms to the Army or DFAS-IN paying office for reconciliation to the activity level invoice (RO63).

5. All activities should be advised that the Assistant Secretary of the Army for Research, Development and Acquisition (ASARDA) has released a policy letter dated 12 July 1996 that implements delayed dispute procedures for all IMPAC micropurchases. In summary, this policy requires card holds to delay dispute on non-received items for a period of 45 days or the receipt of the next invoice, whichever occurs first. The current dispute procedures in use are labor intensive. Studies have shown that most items that have been billed but not received are, in fact, received by the next billing cycle. The GSA contract with RMBCS allows a dispute period of 60 days from the date the initial invoice is received by the activity. Further information on delayed dispute procedures should be directed to Mr. Bruce Sullivan, Army IMPAC program coordinator, commercial (703)681-7564.

6. Requests for exception to the above financial management procedures (paragraph 3) must be approved by the Deputy Assistant Secretary of the Army for Financial Operations (DASA(FO)). Activities granted an exception will be required to provide an automated method that (1) rolls up accounting information to the fewest possible lines of input and (2) transfers that information via electronic file to the paying office. Point of contact is Ms. Kathleen S. Miller, DSN 227-0757, commercial (703)697-0757.

7. The guidance provided in this attachment will be incorporated in future versions of DFAS-IN Regulation 37-1. POC for DFAS and paying office issues is Mrs. Linda Griffin, DSN 699-3250.

LIST OF RECURRING REPORTS

Effective: 1 Feb 97

REPORT	FREQUENCY	DIRECTIVE	DUE FORSCOM
Status Report of Specified Contract Audits (DD-IG(SA) 1580)	Semiannual	AFARS 15.890-3, DODD 7640.2	5 Apr / 5 Oct
Labor Standards Enforcement Report (142-DOL-SA)	Semiannual	DFARS 22.406-13	10 Apr / 10 Oct
DOD Property in the Custody of Contractors, DD Form 1662 (DD-ACQ(A) 1087)	Annual as of 30 Sep and any other date when a contract is completed	FAR/DFARS/AFARS 45.505-14	5 Nov to AMC Rock Island, IL with info copy to FORSCOM
Advance Acquisition Plan	Annual	FFARS 7.190	15 Sep
Bid Protest Action Report (DD-DR&E(AR) 1669)	As applicable	AFARS 33.190-1	15 days after resolution

(d) preparing a negotiation memorandum; and (e) executing a supplemental agreement?

(7) How many contract claims were filed during the past quarter and past fiscal year? What issues were involved and what, if any, remedial measures were undertaken? To what extent was the SJA involved?

(8) How many Contracting Officer's Final Decisions were issued during the past quarter and fiscal year? What issues were involved? How many were appealed to the ASBCA or Court of Federal Claims?

(9) Is workload data being analyzed in relation to original estimates? Are contract adjustments being implemented?

(10) Is a roster of CORs maintained?

5. COMMERCIAL ITEMS.

a. OBJECTIVE. To maximize the use of customary commercial marketplace practices in the acquisition of commercial items IAW the provisions of FAR/DFARS.

(1) Was market research conducted to determine if commercial items or nondevelopmental items were available to meet the government's needs or could be modified to meet the government's needs? (FAR 10.002)

(2) Was market research conducted appropriate to the circumstances in accordance with FAR 10.001(a)(2)?

(3) Were the results of market research used for the appropriate determinations in accordance with FAR 10.001(b)(3)?

(4) Were the description of the government's needs stated in terms sufficient to allow conduct of market research? (FAR 10.002(a))

(5) Did the market research phase cover the information at FAR 10.002 and any other information specific to the item being acquired? (FAR 10.002(a)(1))

(6) If market research established that the government's needs can be met by a type of item available in the

commercial marketplace, were the policies and procedures at FAR Part 12 used? (FAR 10.002(d)(1))

(7) If market research established that the government's needs cannot be met by a type of item or service available in the commercial marketplace and publication of the notice at FAR 5.201 is required, did the contracting officer include the notice to prospective offerors that the government does not intend to use Part 12 for the acquisition? (FAR 10.002(d)(2))

(8) Were the results of the market survey documented in a manner appropriate to the size and complexity of the acquisition? (FAR 10.002(e))

(9) If it is determined that an item or service available in the commercial marketplace can satisfy the government's needs, did the contracting officer use FAR Part 12 for the acquisition? (FAR 12.102(a))

(10) Was the SF 1449 used by the contracting officer when issuing written solicitations, awarding contracts and placing orders for commercial items? (FAR 12.204)

(11) Where technical information is necessary for evaluation of offers was existing product literature used in lieu of unique technical proposals? (FAR 12.205)

(12) Were offerors allowed to propose more than one product in response to solicitations for commercial items? Was each product evaluated as a separate offer? (FAR 12.205(b))

(13) Was past performance (from a wide variety of sources both inside and outside the government) considered in the evaluation and award? (FAR 12.206)

(14) Were either firm-fixed-price or fixed-price with economic price adjustment used to acquire commercial items? (FAR 12.207)

(15) Was the contractor's existing quality assurance system used as a substitute for government inspection and testing before tendering items for acceptance? (FAR 12.208)

(16) Were the policies and procedures in Part 15 used to establish reasonableness of price? (FAR 12.209(a))

(17) Where the contract required the delivery of technical data, were the appropriate provisions and clauses delineating the rights in technical data included as an addenda to the solicitation and contract? (FAR 12.211)

(18) Were the following provisions and clauses included in the solicitation and resultant contract IAW FAR 12.301(a) and (b):

a. 52.212-1, Instructions to Offerors-Commercial Items

b. 52.212-3, Offeror Representations and Certifications-Commercial Items

c. 52.212-4, Contract Terms and Conditions-Commercial Items

d. 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items

(19) When use of evaluation factors was appropriate did the contracting officer include the provision at 52.212-2, Evaluation-Commercial Items or a similar provision containing all evaluation factors required by 13.106-1, Subpart 14.2 or 15.6 as an addendum? (FAR 12.301(c))

(20) Were other FAR provisions and clauses used consistent with the limitations contained in FAR 12.301(e)), e.g.,

a) FAR 16.505 clauses included when an indefinite-delivery type contract is contemplated;

b) the provisions and clauses prescribed in FAR 17.208 or paragraph (b) of 52.212-2 when the use of options is in the government's interest;

c) the provisions and clauses contained in Part 23 when the use of recovered material may be appropriate.

(21) Were the appropriate DFARS clauses used as prescribed IAW DFARS 212.301?

(22) Were the provisions at 52.212-1, Instructions to Offerors - Commercial Items, and the clause at 52.212-4, Contract Terms and Conditions - Commercial Items tailored IAW results of appropriate market research and within limitations of FAR 12.302

to adapt to the market conditions for the acquisition? (FAR 12.302(a))

(23) Were the following paragraphs of the clause at 52.212-4, Contract Terms and Conditions not tailored IAW FAR 12.302(b): Assignments; Disputes; Payment; Invoice; Other Compliances; and Compliance with laws unique to government contracts.

(24) Was a waiver approved by the HCA IAW FAR 12.302 (c) and DFARS 212.302(c) to include tailored clauses or additional terms and conditions in a solicitation or contract that were inconsistent with customary commercial practices for the item being acquired?

(25) Was tailoring accomplished by addenda to the solicitation and contract IAW FAR 12.302(d))?

(26) Does block 26 of the SF 1449 indicated if addenda are attached IAW FAR 12.302(d))?

(27) Were solicitations and contracts assembled, to the maximum extent practicable, using the format at FAR 12.303?

(28) Was the acceptance paragraph in 52.212-4 generally used when acquiring noncomplex commercial items IAW FAR 12.402(a))?

(29) Were other acceptance procedures used as appropriate for complex commercial items or commercial items used in critical applications included as an addendum to ensure adequate protection of the government's interest IAW FAR 12.402(b))?

(30) Were the procedures at FAR 12.403 used when terminating contracts?

(31) Was legal counsel consulted prior to terminating for caused IAW FAR 12.403(c))?

(32) Was a cure notice sent to the contractor prior to terminating a contract other than for late delivery IAW FAR 12.403(c))?

(33) When a termination for cause was used, did the contracting officer send the contractor a written notification IAW FAR 12.403(c) (3)?

(34) Were the procedures at FAR 12.403(d) used when terminating for the government's convenience?

(35) When evaluation factors are used, were the offers evaluated IAW the criteria contained in the solicitation? (FAR 12.602)

(36) When a written solicitation was used, was the combined synopsis/solicitation used to reduce the time required to solicit and award the contract IAW FAR 12.603? If used, did the established response time allow a reasonable opportunity for the prospective offeror to respond?

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --

MDP Construction, Inc.

Under Contract No. DAKF06-93-D-0029

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ASBCA No. 49527

APPEARANCE FOR THE APPELLANT:

Mr. Richard Lewandowski
Secretary/Treasurer

APPEARANCES FOR THE GOVERNMENT:

COL Nicholas P. Retson, JA
Chief Trial Attorney
CPT Jody M. Hehr, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
UNDER RULE 12.3

MDP Construction, Inc. (MDP) timely appealed from the 8 January 1996 contracting officer's final decision which denied MDP's 21 November 1995 claim for \$67,618.26 under the captioned Army contract. The Board has jurisdiction of this appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. On 12 March 1996 MDP elected the Board's accelerated procedures under Board Rule 12.1(b), as amended to reflect § 2351 of the Federal Acquisition Streamlining Act of 1994, P. L. 103-355, which raised the limit to \$100,000 for accelerated appeals. The parties elected a record decision without a hearing pursuant to Board Rule 11. The record consists of the pleadings; Rule 4(a) documents (tabs 1-604); Supplemental Rule 4(a) documents (tabs 605-610); and the parties' briefs. We decide entitlement only.

Summary Findings of Fact

1. On 15 September 1993 the Army's Fort Carson and MDP entered into requirements contract No. DAKF06-93-D-0029 (contract 29) to replace baths in family housing units at Fort Carson, CO, for a fixed unit price for the base and three option years (R4, tab 1).

2. Thus far, respondent has exercised two options, extending contract 29 to 14 September 1996 (R4, tabs 171, 188, 382, 425).

3. Contract 29's line items referred to one or more of 40 bathroom floor plans. Contract line item Nos. 0003AA, AC, AE, AF, AW, AX and BD specified floor plan Nos. 1, 2, 5, 7-11, 31-33, 39

and 40. The 40 floor plans had notes which cumulatively required MDP to: (a) remove and replace water closet, lavatory and vanity, steel and acrylic tubs, ceramic tile (CT) flooring and base, sheet vinyl flooring and base, recessed medicine cabinet, light bar, duplex outlet and switch, and window sealant; (b) remove CT and acrylic tub "surrounds" and install gypsum board and CT wall, (c) remove CT wainscot or vinyl wall covering and install painted gypsum board or tile backer board; (d) remove CT window sill and install painted hardwood sill; (e) remove bath accessories (towel bar, grab bar, soap dish, toilet paper dispenser, shower curtain rod, medicine cabinet, exhaust fan and electrical switch covers) and install new bath accessories shown on drawings; (f) remove vinyl wall covering and install painted gypsum board; and (g) repaint existing walls, window returns, wood doors, frames, trim, linen closet interiors and ceilings. (R4, tab 1, § B, spec. § 01000, ¶ 3.2)

4. Contract 29 priced each line item, but did not price each floor plan, fixture or task within a floor plan (R4, tab 1).

5. Contract 29 incorporated by reference the following pertinent FAR clauses: (a) 52.216-21 REQUIREMENTS (APR 1984), which provided in pertinent part:

(c) Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.

(d) The Government is not required to purchase from the Contractor requirements in excess of any limit on total orders under this contract.

(b) 52.216-18 ORDERING (APR 1984), which provided that the work to be performed was to be "ordered by issuance of delivery orders" and (c) 52.216-19 DELIVERY ORDER-LIMITATIONS (APR 1984), which set for a single item a \$2,000 minimum and \$10,000 maximum, and a \$12,000 combined item maximum, amount below and above which respondent had no duty to order, and MDP had no duty to furnish, the Government's requirements (R4, tab 1).

6. Respondent issued ten delivery orders under contract 29, each stating that it was for services under contract 29 "to be delivered as scheduled on job orders by the contracting officer," or a like phrase. Contract 29's clause 137d established \$2,000

minimum and \$10,000 maximum limitations to each job order. (R4, tabs 1, 10, 105, 216, 285, 346, 369, 391, 513, 606, 608)

7. Between 27 September 1993 and 11 June 1996 the Army issued 87 job orders under these 10 delivery orders, whose cumulative price was \$336,879 (R4, tabs 18-19, 23-24, 46, 53-55, 65, 108-09, 131-32, 162, 219, 236, 244, 255-57, 263-65, 286, 289, 311, 330-31, 334-36, 348-51, 372, 374, 393-94, 402, 407, 437-38, 446-48, 475-76, 481-82, 501-04, 514, 516, 523-24, 527, 529, 555-57, 563, 585, 591-94, 600-01, 606, 608).

8. On 28 September 1995 the Army Corps of Engineers (COE) awarded contract DACA45-95-C-0128 (contract 128) to Selco, Inc. for the fixed price of \$4,653,375 to revitalize officer family housing at Fort Carson, CO (R4, tab 602).

9. Contract 128 scheduled "Phase I" work to commence 15 November 1995 at 59 designated housing units in buildings C, D, 1, 2, and 3, and "Phase II" work to commence 1 September 1996 at 24 designated housing units in buildings A and B. Contract 128 required renovation of full or one-half bathrooms in each of those 83 housing units. (R4, tab 602, spec. page IFB-1, § 00800, ¶ 1; tab 603 at dwg. sheets 1, C1.1)

10. Contract 128 did not identify bathrooms by floor plan numbers (R4, tabs 602, 603); thus, a bathroom in contract 128's drawings cannot be identified by number with one of contract 29's 40 bathroom floor plans (R4, tab 1). However, contract 29 bathroom floor plans can be correlated to bathrooms depicted in contract 128 drawings by comparing their configurations and fixtures.

11. Based on such correlations, we find that contract 128's bathroom scope of work included the following contract 29 tasks:

<u>Bldg.</u>	<u>Floor Plans</u>	<u>Included tasks</u>	<u>No. of Bathrooms</u>
A	31, 32	Remove and replace water closet, lavatory, bathtub, tub surrounds, CT walls, CT wainscot, recessed medicine cabinet and bath accessories; remove CT flooring.	8
	32	Add new exhaust fan.	8
B	31, 39	Remove water closet, add new exhaust fan.	32
C	31, 39	Remove CT flooring, add new exhaust fan.	18
D	32, 39	Remove water closet, add new exhaust fan.	40

1	1, 3	Add new exhaust fan.	8
2	5, 10	Add new exhaust fan.	44
3	33	Add new exhaust fan.	4

(R4, tabs 1; 603 at dwgs. 1, A1.1 to A8.1, M1.1 to M8.1, and AA-1 to AA-7)

12. Contract 29's specifications required respondent to remove asbestos on each delivery order prior to MDP's work (R4, tab 1, § 01000, ¶ 2.1.4). We find that removal of flooring with asbestos containing material (ACM) under contract 128 did not duplicate contract 29 work to remove non-ACM flooring in buildings B and D (R4, tabs 1, 603 at dwgs. A2.1, A.2.2, A4.1, AA-2, AA-4).

13. MDP's 21 November 1995 claim to respondent requested a contracting officer's final decision, alleging that the purchase of family housing bath fixtures under contract 128 "infringed" the following contract 29 line items, floor plans and quantity of units:

<u>Line Item</u>	<u>Plan No.</u>	<u>Quantity</u>
0003AA	Plan 1	4
0003AC	Plan 5	22
0003AE	Plan 7	4
0003AF	Plan 10	22
0003AW	Plan 32 [sic]	54
0003AX	Plan 33	4
0003BD	Plan 39	53

and requested that the infringing work be deleted from contract 128 or alternatively for payment of \$67,618.26 in lost profits (R4, tab 532).

14. The contracting officer's 8 January 1996 final decision denied MDP's 21 November 1995 claim (R4, tab 581). MDP timely appealed that 8 January 1996 final decision to the ASBCA on 23 January 1996.

DECISION

On 13 August 1996 respondent moved to strike the 1 August 1996 affidavit of Richard Lewandowski (attached to appellant's brief), because it was not filed by 26 July 1996 as the Board had ordered. We grant that motion and have not considered Mr. Lewandowski's affidavit in our Summary Findings of Fact set forth above.

The Government breaches when it purchases from another source the supplies or services for which it contracted in a requirements contract. Ronald A. Torncello and Soledad Enterprises, Inc. v. United States, 681 F.2d 756, 231 Ct. Cl. 20 (1982).

Respondent concedes in its brief that contract 128's work scope included certain contract 29 work (finding 11). Respondent argues that it did not breach contract 29, however, since contract 128's work is "essentially different" from that in contract 29. First, contract 29's work scope was much greater than the "small fraction" of bathroom work in contract 128. Second, contract 128 required removal of flooring and installation of exhaust fans, but contract 29 required both their removal and replacement. Respondent argues that contract 29 had no price for single fixtures, so MDP cannot recover the line item price of a complete bathroom renovation for removing flooring or installing exhaust fans duplicated by contract 128, and the price for some accessories was below the \$2,000 minimum order requirement in contract 29 (finding 5(c)).

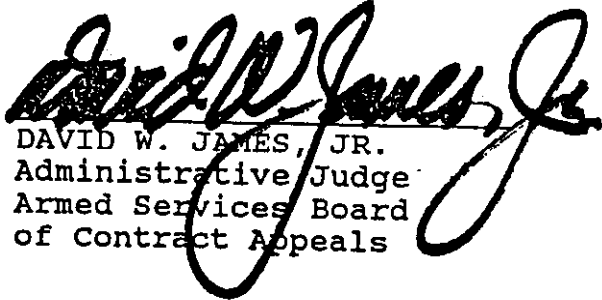
The fact that contract 128 duplicated only some of contract 29's work and required only removal or installation rather than both removal and installation of fixtures (findings 3, 11), does not defeat liability for the duplicated work. The Government breached only item 8 of the 12-item contract in Torncello.

Respondent cites Cleek Aviation v. United States, 19 Cl. Ct. 552 (1990), Eastern Ambulance Services, VABCA No. 2078, 86-2 BCA ¶ 18,852, and Hemet Valley Flying Service Co. v. United States, 7 Cl. Ct. 512 (1985), for the rule that a requirements contract is not breached when the allegedly breaching contract is for essentially different services. In Cleek, a contract to supply JP4 fuel to large, portable "bladders" did not breach Cleek's requirements contract to deliver JP4 fuel into military aircraft fuel tanks, with a \$.26 per gallon "into-plane fee" for personnel and equipment to perform such services. In Eastern Ambulance, a stretcher transfer contract without emergency medical technicians and equipment except for IV and oxygen hookups did not breach a requirements contract for in-transit ambulance services with emergency medical technicians and equipment. Hemet was an indefinite quantity, not a requirements contract. The critical distinguishing elements in Cleek and Eastern Ambulance, a requirement and price element for specialized personnel or equipment, are absent in contract 128 in this appeal.


Contract 29 priced only line items, but not each fixture or task within a line item. This does not avoid Government liability, but means only that one cannot determine damages from the present record. Respondent's argument that some tasks were priced below contract 29's \$2,000 minimum order amount is based on speculation, not on any record evidence.

We sustain the appeal and remand it to the parties to negotiate quantum.

Dated: 4 September 1996

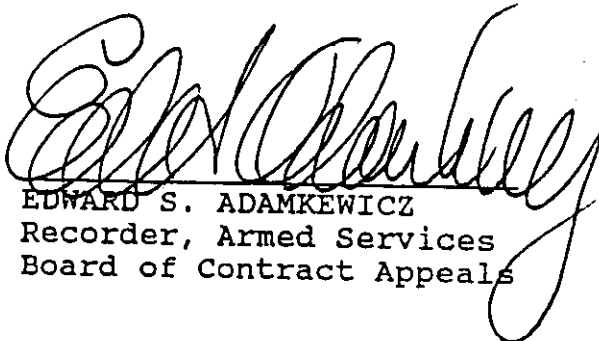

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur


MARK N. STEMLER
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 49527, Appeal of MDP Construction, Inc., rendered in conformance with the Board's Charter.

Dated: 5 SEP 1996


EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --

MDP Construction, Inc.

Under Contract No. DAKF06-93-D-0029

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ASBCA No. 49527

APPEARANCE FOR THE APPELLANT:

Mr. Richard Lewandowski
Secretary-Treasurer

APPEARANCE FOR THE GOVERNMENT:

COL Nicholas P. Retson, JA
Chief Trial Attorney
CPT Jody M. Hehr, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION FOR RECONSIDERATION

Respondent timely moved to reconsider the Board's 4 September 1996 decision in the captioned appeal on five grounds: First, the Board compared only the bathroom portion of Selco's housing renovation contract (instead of the entire renovation workscope) with appellant's bathroom renovation contract to decide whether the Selco contract overlapped MDP's contract. Second, the phrase "activity . . . specified in the Schedule," in the FAR 52.216-21 REQUIREMENTS (APR 1984) clause does not apply to a contract awarded by the Omaha Army Engineer District. Third, we distinguished Cleek Aviation v. United States, 19 Cl. Ct. 552 (1990) and Eastern Ambulance Services, VABCA No. 2078, 86-2 BCA ¶ 18,852, and cited Ronald A. Torncello and Soledad Enterprises, Inc. v. United States, 681 F.2d 756, 231 Ct. Cl. 20 (1982) invalidly. Fourth, Finding of Fact ¶ 11 contains "several factual errors." Fifth, some breaching tasks were priced under the \$2,000 minimum order limit of contract 29. Appellant opposed respondent's motion on 17 October 1996.

We deny the motion for the following reasons. First, the fact that contract 128 specified more comprehensive work than contract 29 does not mean that we must include such additional work scope in comparing the two contracts. As we stated in the original decision, the Government breached only one of a 12-item contract work scope in Torncello, which stated: "Separate evaluation of the parties' relationships for various of the items is warranted by the very discrete natures of the tasks and by the different bases on which those tasks were to be performed." Some tasks were for a definite quantity, others were for the activity's requirements. 231 Ct. Cl. at 22, 28 note 1. Separate evaluation of the bathroom items was warranted in the present appeal.

Second, movant interprets the phrase "activity . . . specified in the Schedule" to exclude the breaching activity, Omaha Corps of Engineers. The REQUIREMENTS clause requires respondent to award

the requirements contractor all the requirements of the "activity . . . specified in the Schedule," in contract 29, all bathroom renovation requirements of Fort Carson, Colorado. Movant's interpretation would permit the Government to breach a requirements contract with impunity simply by arranging for an associated activity -- the Corps of Engineers, the Navy, the Air Force, etc. -- to place the breaching contract. Movant's contention that our decision bodes the end of awarding concurrent Army requirements and larger renovation contracts at the same activity, simply means that respondent must take care to assure that "larger renovation contract" work scopes do not overlap any part of a requirements contract work scope at the same military activity, surely not an impossible task.

Third, Cleek and Eastern Ambulance were decided on the common basis that the contract required specialized personnel and equipment to perform the into-plane refueling, or emergency medical services, features not present in the bathroom renovation work scopes of contracts 29 and 128. Whether such requirement was separately priced was not critical to those decisions. Torncello's most well known feature, of course, was its analysis of whether, when the Government knows before awarding a requirements contract that it can obtain the same item elsewhere at a lower price, the convenience termination clause limits the Government's liability. 231 Ct. Cl. at 31-47. But the logical and contractual prerequisite for its analysis of the non-breaching party's mode of recovery was the court's holding that the Government's breach of Soledad's requirements contracts was unexcused. 231 Ct. Cl. at 48. Other precedents for this principle one can cite include Ready-Mix Concrete Company, Ltd. v. United States, 141 Ct. Cl. 168, 175 (1958); First Suburban Water Utility Dist. v. United States, 129 Ct. Cl. 8 (1954).

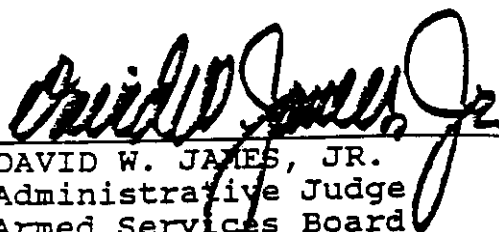
Fourth, finding 11 did not mention floor plans 23 and 28 or any 1/2 bathroom; these were irrelevant to the issues. We correctly found that floor plans 1, 3, 5, 10, 31, 33 and 39 in contract 128 matched the floor plans in contract 29 and required adding a new exhaust fan, thus duplicating that work in contract 128. It is correct that contract 29 required removal of water closets from buildings B and D to permit another party to remove underlying asbestos flooring. That fact does not save contract 128 work (removal of water closets in buildings B and D) from breaching contract 29, for the reasons cited in the first point, above.

Fifth, respondent urges that R4, tab 128, is proof that removing water closets or ceramic tile flooring and adding exhaust fans in buildings B, C, D, 1, 2 and 3 were priced below the \$2,000 minimum order threshold. MDP's 22 February 1994 proposal (R4, tab 123) was for a new bathroom floor plan matching no floor plan in contract 128 (R4, tab 1). MDP proposed \$1,728 for demolition and installation labor, identified no price for adding an exhaust fan, and respondent rejected that proposal. R4, tab 128, does not prove that the work in buildings B, C, D, 1, 2 and 3 on floor plans 1, 3,

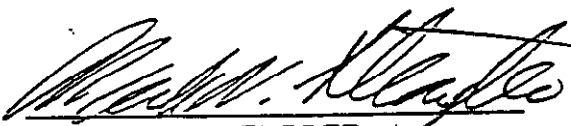
5, 10, 31, 33 and 39 in contract 128 was priced below the \$2,000 minimum order threshold.

We deny the motion.

Dated: 24 October 1996

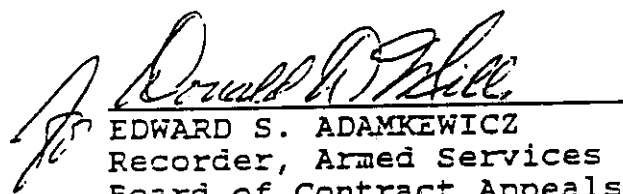

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur


MARK N. STEPLER
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 49527, Appeal of MDP Construction, Inc., rendered in conformance with the Board's Charter.

Dated: 31 OCT 1996


EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals



Decision

Matter of: Collins Companies

File: B-274765

Date: December 27, 1996

Joel S. Rubenstein, Esq., Bell, Boyd & Lloyd, for the protester.

Col. Nicholas P. Retson, Department of the Army, for the agency.

Robert Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid which included only a facsimile copy of a required bid bond and power of attorney was properly rejected as nonresponsive.

DECISION

Collins Companies protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. DAKF57-96-B-0027, issued by the Department of the Army to replace siding on military housing units at Fort Lewis, Washington. The Army rejected Collins's bid as nonresponsive because it contained only facsimile bid bond documents; the Army viewed such documents as not establishing that the surety would be bound to honor the bond in the event of default. Collins argues that its facsimile bid bond was authorized and binding and that therefore rejection of its bid was improper.

We deny the protest.

The IFB, which was issued on August 14, 1996, with bid opening on September 13, required bidders to submit a bid bond in the amount of 20 percent of the bid price or \$3,000,000, whichever was less. On the day of bid opening, a representative of Collins called the contracting specialist to ascertain whether its bid package had been received; upon being informed that it had not been received, the representative asked whether a telefacsimile bid would be acceptable. The protester asserts that in the ensuing conversation with the contracting specialist, it was informed that it would be acceptable to "fax everything over." According to the contract specialist's sworn account of the conversation, she informed the representative that a telefaxed bid would be unacceptable because the Army needed original signatures on all documents. Further, according to the specialist's statement, when Collins's representative asked if a copy could be telefaxed to an associate of the firm located in the area of the bid opening and then signed and

hand delivered, she informed the representative that this would be an acceptable method of transmission if the bid documents all bore original signatures of persons authorized to bind the firm and if they were delivered in a sealed envelope prior to the time set for bid opening.

The package received from Collins by the time set for bid opening contained a bid with the original signature of an authorized representative on the cover page. All documents relating to the bid bond were, however, telefaxed copies which bore no original signatures. As a result, the contracting officer rejected Collins's bid as nonresponsive and this protest followed.

A bid bond is a form of guarantee designed to protect the government's interest in the event of default; if a bidder fails to honor its bid in any respect, the bid bond secures a surety's liability for all procurement costs. As such, a required bid bond is a material condition of an IFB with which there must be compliance at the time of bid opening; when a bidder submits a defective bid bond, the bid itself is rendered defective and must be rejected as nonresponsive. The determinative question as to the acceptability of a bid bond is whether the bid documents, including the power of attorney appointing an attorney-in-fact with authority to bind the surety, establish unequivocally at the time of bid opening that the bond is enforceable against the surety should the bidder fail to meet its obligations. If the agency cannot determine definitely from the documents submitted with the bid that the surety would be bound, the bid is nonresponsive and must be rejected. Morrison Constr. Servs., B-266233; B-266234, Jan. 26, 1996, 96-1 CPD ¶ 26.

Photocopies of bid guarantee documents generally do not satisfy the requirement for a bid guarantee since there is no way, other than by referring to the originals after bid opening, to be certain that there had not been alterations to which the surety had not consented, and that the government would therefore be secured. Id. A telefaxed bid guarantee document, which is an electronically transmitted copy, is subject to the same uncertainty as a photocopy transmitted by mail; since it is not the original, there is no way to be certain that unauthorized alterations have not been made without referring to the original documents after bid opening. Global Eng'g, B-250558, Jan. 11, 1993, 93-1 CPD ¶ 31¹.

Collins first asserts that, based on the September 13 conversation between its representative and the contracting specialist concerning telefaxed bids, the agency is estopped from rejecting its bid since, according to Collins, the specialist authorized the electronic method of transmission. As indicated above, in the contracting specialist's statement recounting the conversation she denies that such

¹Here, the agency properly refused to consider documents submitted by Collins after bid opening which were intended to establish the responsiveness of its bid.

advice was given. In any event, even if we were to accept Collins's version, oral advice concerning the acceptability of photocopied (or telefaxed) bid bonds is not binding; a contractor relies on oral advice with respect to solicitation requirements at its own risk. Pollution Control Indus. of Am., B-236329, Nov. 22, 1989, 89-2 CPD ¶ 489.

Collins next argues that the telefaxed bid bond package, when read as a whole, establishes that the surety would be bound to honor the bond in the event of default. For the reasons set forth below, we disagree.

The power of attorney form contained in the package contained the following statement in the left margin:

**"WARNING
THIS IS NOT A VALID POWER OF ATTORNEY IF THIS
STATEMENT DOES NOT APPEAR IN RED INK"**

In the telefaxed copy submitted to the Army in Collins's bond package, the quoted warning appeared in black print. This fact would appear to make the power of attorney invalid on its face, thus calling into question the authority of the purported attorney-in-fact named in the document. Global Eng'g, supra. Collins argues that other language contained in the power of attorney form obviates this apparent invalidity. In particular, Collins refers to the following excerpt from a resolution of the surety's board of directors quoted on the form:

". . . the signatures of [designated corporate officers] and the seal of [the surety] may be affixed to any such power of attorney or to any certificate relating thereto by facsimile. . . ." (Emphasis added.)

We have expressly considered this argument on other occasions where a telefaxed or photocopied power of attorney contained virtually identical language. It is our view that phrases such as "affixed by facsimile" do not refer to telefaxed or photocopied documents, but rather to signatures produced by mechanical means, for example, stamped, printed or typewritten signatures. In short, the language does not reasonably suggest that the surety consented to be bound by bid bonds which, after leaving the surety's hands, had been photocopied or telefaxed. Frank and Son Paving, Inc., B-272179, Sept. 5, 1996, 96-2 CPD ¶ 106; Morrison Constr. Servs., supra; Global Eng'g, supra.

Collins attempts to distinguish its situation by arguing that another document contained in its telefaxed bid bond package authorizes transmission of bond documents by electronic means. Specifically, the protester points to a telefaxed letter dated September 13 and signed by the purported attorney-in-fact which states: "This letter authorizes Collins Companies to use in place of the original bid bond

and power of attorney a fax copy of the same." The problem with this reasoning is that the individual purporting to bind the surety under a telefax authorization is himself authorized by a power of attorney form which, as discussed above, is legally invalid on its face. Under these circumstances, this individual's letter has no legal effect.

Since the telefaxed bid bond package contained in Collins's bid did not unequivocally establish that the surety would be bound to honor the bond in the event of default, the bid was properly rejected as nonresponsive. Morrison Constr. Servs., supra.

The protest is denied.

Comptroller General
of the United States